Harris, et al. v. *Fred Hand, Jr., et al.* A copy of the opinion, including findings of fact, conclusions of law and judgment, is attached hereto as an Appendix.

Jurisdiction

This suit was brought under 28 U. S. C. §§1343(3) and (4) and 42 U. S. C. §§1971, 1981 and 1983. A three-judge court was convened pursuant to Title 28 U. S. C. §§2281 and 2284. The suit was brought to enjoin threatened criminal prosecutions under Georgia statutes alleged to be unconstitutional on their face and as applied as abridging freedom of speech, assembly, and the right to petition. The judgment of the District Court was entered on February 24, 1965 and notice of appeal was filed in that court on March 27, 1965. Subsequently, a motion to reconsider its opinion was filed in that court on May 17, 1965. On May 22, 1965, an application for an extension of time to docket the appeal and file the record was made to the presiding judge of the District Court pursuant to Supreme Court Rule 13(1), and said application was granted on May 24, 1965. The order provided that the time for docketing the appeal was extended until June 15, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal to this court: *Dombrowski* v. *Pfister,* 380 U. S. 479; *Douglas* v. *Jeannette,* 319 U. S. 157; *Cameron* v. *Johnson,* —— U. S. ——, 33 U. S. L. W. 3395.

Questions Presented

1. Where appellants have alleged that a criminal statute under which prosecutions are threatened is unconstitutional on its face, in that it abridges freedom of speech, expression, assembly and the right to petition for redress of grievances, was the District Court in error in denying injunctive relief on the ground that appellants would sustain no irreparable injury by having their constitutional claims adjudicated by the state courts?

2. Was the District Court in error in failing to hold that section 26-904 of the Georgia Code, which makes it a felony to circulate papers, pamphlets or circulars for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the state, is unconstitutional on its face?

3. Was the District Court in error in failing to hold that section 26-904 of the Georgia Code was unconstitutional as applied to the activities of the appellants, as established by the evidence in this case?

Statutes Involved

Georgia Code Ann. Chapter 26-9.

26-901. *Definition.*—Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

26-902. *Attempt to incite insurrection.*—Any attempt, by persuasion or otherwise, to induce others to join in any

combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.

26-903. *Punishment.*—Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than 20 years.

26-904. *Circulating insurrectionary papers.*—If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years.

Statement

Appellants Samuel B. Wells and Donald Harris were involved in civil rights activities in Albany, Georgia, in 1964. Samuel B. Wells is an official of the Southern Christian Leadership Conference and Donald Harris is a member of the Student Nonviolent Coordinating Committee, organizations with headquarters in Atlanta, Georgia. These organizations were acting together with the Albany Movement, a group composed of citizens of Albany, Georgia, in a program designed to obtain equal rights for Negro citizens of that city.

On Saturday, August 15, 1964, a Negro man, Wilmon Jones, was shot and killed by a member of the Albany Police Force at the Albany City dump (238 F. Supp. 780). When appellant Wells heard of the shooting, he conducted a brief inquiry and concluded that the killing was unjustified (R. 290). Together with appellant Harris and others, he wrote and distributed two leaflets urging Negro citizens to attend a meeting that evening at a local church in order to take some action to protest the killing[1] (R. 291-92).

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[1] Original copies of the leaflets were introduced as Plaintiffs Exhibits A and B in the hearing below (R. 32-33). Their text is as follows:

Leaflet number one:

"ALBANY POLICE HAVE
MURDERED ANOTHER NEGRO!

THIS AFTERNOON ANOTHER ONE OF PRITCHETT'S GUNMEN SLAUGHTERED A NEGRO MAN, WILBERT JONES, OF FRONT STREET.

THIS BLACK MAN, LIKE THE LONG LIST OF OTHERS KILLED BY PRITCHETT'S MURDEROUS MOB . . . INCLUDING ONE GUNNED DOWN TWO WEEKS AGO IN C.M.E. . . . . PLUS HARRIS, ASBURY, MILLER AND OTHERS, WAS UNARMED AND IN NO WAY BREAKING THE LAW WHEN HE WAS SHOTGUNNED IN THE BACK.

TONIGHT IS THE TIME TO ACT

BLACK MAN * * AREN'T YOU TIRED OF GOING TO FUNERALS?
AREN'T YOU READY TO ACT?

BE AT EUREKA BAPTIST CHURCH * * IN HARLEM * *
ON JACKSON STREET AT 8:00 TONIGHT

BE AT EUREKA BAPTIST CHURCH
TONIGHT IN HARLEM

JACKSON ST. NEXT TO GILES 8:00 p.m."

(The Pritchett referred to is the Chief of Police in Albany.)

(footnote continued on following page)

In response to the leaflets a crowd, variously estimated as between 100 and 300 persons, gathered at the Eureka Baptist Church in the Negro section of Albany, known as Harlem (R. 313, 319). The church was selected as a meeting place because it had been the scene of an earlier killing of a Negro by the Albany Police (R. 316-17). Rev. Wells spoke briefly at the meeting, telling the people that he was going to go down to the police station to present a petition protesting the killing of that afternoon and that anyone who wished to might follow him for that purpose[2] (R. 350-51).

Leaflet number two:

"ALBANY POLICE HAVE
MURDERED ANOTHER NEGRO!

ALBANY POLICE HAVE KILLED
TOO MANY NEGROES . . .
. . . REMEMBER HARRIS!
. . . REMEMBER ASBURY!
. . . REMEMBER MILLER!

2 WEEK AGO A NEGRO WAS SHOT
IN THE BACK IN CME . . .

IT IS TIME TO ACT!

BE AT EUREKA BAPTIST CHURCH
TONIGHT IN HARLEM

JACKSON ST. NEXT TO GILES 8:00 P.M."

[2] The petition taken to the police station was introduced as appellants' Exhibit "C" (R. 34) and reads as follows:

To Chief of Police Lauri Pritchett:

Today another Negro was shot and killed brutally by an Albany policeman.

The people of Albany have protested many times the brutality of the men who are supposed to enforce the law of our city. The result has always been inaction and evasion, all meant to excuse murder.

(footnote continued on following page)

Reverend Wells and Donald Harris began walking down the street towards the police station, accompanied by approximately twelve to sixteen persons (R. 307-09). The District Court said that a "considerable number" of the audience went with appellants, and that the "throng" was "sizeable" and was a "multitude." 238 F. Supp. at 782. However, there is no evidence to support these characterizations. Rev. Wells testified repeatedly that twelve, fourteen, or sixteen persons accompanied him (Plaintiffs' Exhibit D, p. 75). The only evidence rebutting this was in an affidavit by appellant Harris in which he said there were thirty-five to forty persons. At all times, however, this group was orderly (R. 6).

When they had proceeded approximately one block, and were near the city's bus station, a number of bottles and other missiles were thrown by persons unknown (R. 307-08). The testimony conflicted as to the direction from which

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Black citizens and thoughtful whites of Albany are angered by this latest incident, and we demand that further incidents be prevented.

We of the Albany Movement and the Student Nonviolent Coordinating Committee have faith and confidence in the philosophy of nonviolence as a means of social protest. We have petitioned the city officials of Albany time and time again to thoroughly investigate and fairly prosecute those responsible for these acts, but our pleas for justice and eradication of the brutal and savage tactics used by the Albany Police Department have gone unheard.

What little influence that the nonviolent leaders of this community have is quickly ebbing. For the sake of Albany—the total community—we demand a complete and thorough investigation of this killing and prosecution of the officers involved.

THE ALBANY MOVEMENT

SOUTHWEST GEORGIA STUDENT
NONVIOLENT COORDINATING COMMITTEE

these missiles came. Reverend Wells testified that they came from a group of persons across the street from his group and not associated with them (R. 308, 314-15). A police officer at whom some of the missiles were thrown testified that they seemed to have come from the direction of Reverend Wells' group, although he could not say for certain that they came from any one of the sixteen persons carrying the petition to the Chief of Police (Pls. Ex. F, pp. 14-16). When a number of bottles broke at the feet of Reverend Wells, he decided that it would be dangerous for the group to continue walking. Therefore, he immediately turned them around and the sixteen persons walked back in the direction from which they had come, got into automobiles, and went by different routes to the police station (R. 309-10).

At the station they asked to see Chief of Police Laurie Pritchett but were informed that he was out of town. They did see the assistant chief and presented him the petition. He asked who had written the petition and requested that appellants Wells and Harris sign their name to it, which they did (R. 299). The group then left the police station. Reverend Wells and Donald Harris went to their homes and did not participate in any of the events in Harlem later that evening (R. 311).

Between the time that appellants turned around at the bus station and the time of their discussion with the assistant chief of police, disturbances had broken out in the Harlem area. A large group of persons, mostly Negroes, had assembled in the street and were throwing bricks and bottles, breaking in windows of stores and looting some of them (Pls. Ex. D, pp. 14-15). News of these events arrived at the police station at the time appellants and their group were there. The assistant chief of police asked them about

the events and inquired as to whether they were responsible for them. Reverend Wells told him that they had nothing to do with it (R. 341). The police were finally able to restore order in the Harlem area about two hours later (Pls. Ex. D, p. 16).

The District Court said that "it is clear that the acts were being committed by those marching with them [appellants] or by sympathizers accompanying the marchers." 238 F. Supp. at 782. However, there is no evidence to support this statement, either as to the disturbances near the bus station or the one later that evening. The officer at the station testified that he was not sure from whom the missiles came from (see *supra*). And an officer at the scene of the later riot testified that he did not see Rev. Wells at the scene (Pls. Ex. D, p. 64) and did not know where the rioters had come from (*Id.*, p. 67). Not only is the record devoid of evidence that the disturbances were caused by appellants' actions, but Rev. Wells' testimony was to the effect that he feared that the outbreak of violence was imminent because of the people's resentment over what they believed to be unwarranted acts of police brutality, and he was trying to give them an alternative, peaceful, and nonviolent means of protesting to the authorities (R. 329, 344-45).

On the morning of August 18, 1964, appellant Wells was arrested upon a warrant sworn out by the appellee, Laurie Pritchett, Chief of Police of Albany, Georgia, charging him with violations of section 26-902 of the Georgia Code (attempting to incite insurrection) and §26-904 (circulating insurrectionary papers) (Pls. Ex. E). Appellant Wells was held in confinement for thirteen days without bail on the charge under §26-902, which is an unbailable capital offense under Georgia law (see Georgia Code §26-903). On August 24, 1965, a commitment hearing was held on the

charges against appellant Wells and he was bound over to the grand jury on both charges. Subsequently, the charge under §26-902 was "no billed" by the grand jury at the request of Fred Hand, Jr., Solicitor General, on the ground that the statute was unconstitutional. Rev. Wells was then admitted to $2,500 bail on the charge under §26-904 (R. 198). An indictment against Wells for circulating insurrectionary papers was handed down by the Dougherty County grand jury on May 10, 1965. (See n. 6 *infra.*)

On August 17, 1964, a warrant was issued upon the affidavit of appellee Pritchett for the arrest of appellant Donald Harris on a charge under §26-904 (Pls. Ex. L). To date, Harris has not been arrested and during such time as he may be present within the State of Georgia he is subject to arrest.

On September 15, 1964, after having two petitions for removal denied, *inter alia,* on the ground that no criminal prosecution had been begun, appellants filed their complaint in this case seeking to enjoin prosecutions under §§26-902 and 26-904 on the grounds that they were unconstitutional on their face and as applied to the activities of the appellants (R. 25). The defendants remaining after changes in the parties during the course of the hearing were Fred Hand, Jr., Solicitor General of the Albany Judicial Circuit, for whom has been substituted Robert Reynolds, the present Solicitor General; G. S. Thornton, Justice of the Peace in the county who issued the warrants involved and who has subsequently died (238 F. Supp. 779 at 783); Laurie Pritchett, Chief of Police of the City of Albany, under whose direction the investigation leading up to the issuance of the warrants was conducted and who swore out the warrants; and Billy L. Manley, Captain of Detectives

in the Albany Police Department, who is responsible for the conduct of investigations including the one leading up to the warrants and arrests herein.

A three-judge court was convened and a hearing, which by stipulation was on a motion for permanent injunction (R. 162), was held. The court denied injunctive relief on the grounds that:

(1) All parties agreed that no prosecution could be had under §26-902 because of its unconstitutionality and that charges under it had been dismissed and assurances made that no further prosecutions would be made;

(2) There had been a failure by appellants to show that the prosecutions were instigated for the purpose of interfering with the constitutional rights of appellants; and

(3) That even if §26-904, the only section under which prosecutions were still pending, were unconstitutional either on its face or as applied, the court would refrain from interfering with the state prosecutions since no irreparable injury had been shown. The denial of injunctive relief was conditioned on a reduction of the bail required to $1,000, which reduction has been made.

A timely notice of appeal from the decision below was filed and a subsequent motion to reconsider the court's judgment in light of this court's opinion in *Dombrowski* v. *Pfister*, 380 U. S. 479, was denied (Supplemental Record, p. 9).

The Questions Are Substantial

The initial question involved in this appeal is substantially the same as that raised and decided in the case of *Dombrowski* v. *Pfister*, 380 U. S. 479, decided by this Court on April 26, 1965. In *Dombrowski* this Court held that it was error for a federal three-judge court to refrain from deciding a claim that a state statute was unconstitutional on its face as abridging freedom of speech. Here, the District Court, although it held a hearing, denied injunctive relief for reasons similar to those advanced by the lower court in *Dombrowski* in dismissing the complaint. The second question involved, whether §26-904 of the Georgia Code Annotated is unconstitutional on its face and as applied, is governed largely by this Court's determination in *Herndon* v. *Lowry*, 301 U. S. 242, that a companion statute, §26-902, was unconstitutional.

1. The complaint in this case alleged, *inter alia*, that:

> Sections 26-902 and 26-904 of the Georgia Code are unconstitutional both on their face and as applied to plaintiffs. Specifically, these statutes and the actions of the defendants in enforcing and executing them violate the First, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States in that:
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> • • • • •
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> (b) They abridge plaintiffs' freedom of speech, press and assembly, and their rights to petition lawful authority for a redress of grievance; . . . (R. 25).

In their memoranda of law, plaintiffs argued that §26-904 was overly broad and vague. Appropriate relief, including

an injunction against the threatened prosecutions of plaintiffs under these statutes, was requested.

Despite these allegations, however, the court below, in refusing the relief requested, declined to express any view concerning the constitutionality of §26-904 and stated:

> Even if it should ultimately be determined that Georgia Code §26-904 as applied to these Plaintiffs is unconstitutional, the Plaintiffs are not without adequate remedy and protection short of the issuance of this Court's injunction. Federal courts of equity have traditionally been loathe to restrain criminal proceedings in the state courts even on constitutional grounds and all of the constitutional issues can be decided in the first instance as a matter of course by the state courts. (238 F. Supp. 779 at 785.)

The court went on to say that the threat of prosecution under a statute alleged to be unconstitutional on its face because it abridged freedom of speech, assembly, and the right to petition for redress of grievance did not constitute irreparable injury sufficient to warrant injunctive relief. Therefore, the case was an appropriate one to withhold relief because an indictment could be narrowly drawn and the Georgia courts could construe the statute so that it would be constitutional.

This conclusion is in direct conflict with this Court's decision in *Dombrowski*. There, as here, persons threatened with prosecution under a state criminal statute attacked it on the ground that it was unconstitutional as an abridgment of First Amendment rights. This Court held:

> The District Court also erred in holding that it should abstain pending authoritative interpretation

> of the statutes in the state courts, which might hold that they did not apply to SCEF, or that they were unconstitutional as applied to SCEF. We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike Douglas v. City of Jeannette, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.
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> Second, appellants have challenged the statutes as overly broad and vague regulations of expression. We have already seen that where, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity. We believe that in this case the same reasons preclude denial of equitable relief pending an acceptable narrowing construction. 380 U. S. ——, 14 L. Ed. 2d 22, 30-31.

Under this holding, therefore, the District Court was obliged to decide the substantive question raised, and its decision must be reversed or vacated and the cause remanded on this ground alone. *Cameron* v. *Johnson*, —— U. S. ——, 33 U. S. L. Week 3395.[3]

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[3] In *Cameron*, the Court in a *per curiam* order of five justices remanded for reconsideration in light of *Dombrowski*. Justices Black, Harlan, and Stewart would have affirmed, while Justice White would have set the case for argument. One of the main bases for the dissents was that the justices felt that the statute involved in *Cameron* was clearly constitutional. This case, however, presents a statute about which there are undeniable questions of constitutionality because of *Herndon* v. *Lowry*, 301 U. S. 242.

2. Appellants also contend that this court should find that §26-904 is unconstitutional on its face as abridging freedom of speech, assembly and petition in violation of the First and Fourteenth Amendments and that it is unduly vague, uncertain and broad. This contention raises the question as to the extent this case is controlled by this Court's decision in *Herndon* v. *Lowry*, 301 U. S. 242. That case held that the precursor of §26-902 of the Georgia Code was unconstitutional as violating the First and Fourteenth Amendments.

Both sections 26-902 and 26-904 are part of Chapter 26-9 of the Georgia Code which deals with insurrection and attempts to incite insurrection. Section 26-901 defines insurrection to "consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence." Section 26-902 defines an attempt to incite insurrection as an attempt "to induce others to join in any combined resistance to the lawful authority of the State." Section 26-903 provides that insurrection and the attempt to incite insurrection shall be a capital offense, and finally, section 26-904 makes it a crime to "bring, introduce, print, or circulate," or cause or aid or assist in introducing, circulating, or printing any writing for "the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State."[4]

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[4] At the time of *Herndon*, these provisions appeared as sections 55 to 58 of the Georgia Penal Code. The full texts of sections 26-902 and 26-904 are as follows:

> 26-902. *Attempt to incite insurrection.*—Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.

(footnote continued on following page)

In *Herndon* v. *Lowry* the Court found that the words "to incite insurrection," found in §26-902 and defined there and in §26-901, were overly broad and vague, giving no warning of the conduct proscribed. Therefore, the section was unconstitutional because it seriously impinged on legitimate free speech activities.

In the present case, the court and the parties below recognized that §26-902 was clearly unconstitutional because of the decision in *Herndon*.[5] Thus it necessarily recognized that that part of §26-904 which made it a crime to circulate any writing for the purpose of inciting insurrection was also unconstitutional. Despite this, the court indicated that §26-904 could be upheld because the part of the section making it a crime to circulate papers for the purpose of inciting riot, conspiracy or resistance against the lawful authority of the state could be construed to be independent of the insurection provision and thus could be found to be constitutional. Although the warrants under which Reverend Wells was arrested and Donald Harris was threatened with arrest were for "circulating insurrectionary papers" the court said that the prosecutor still might prepare an

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26-904. *Circulating insurrectionary papers.*—If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or to be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years.

[5] Another district court reached the same conclusion and enjoined criminal prosecutions under §26-902 in *Aelony* v. *Pace*, —— F. Supp. ——, 8 Race Rel. L. Rep. 1355 (M. D. Ga., Nos. 530, 531, 1963).

indictment which charged only incitement to riot, and such an indictment and a conviction under it would be valid. 238 F. Supp. at 785.[6]

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[6] The court below, by discussing the statute in terms of such hypothetical occurrences, was in conflict with the decision in *Dombrowski*. There, this Court said:

> In considering whether injunctive relief should be granted a federal district court should consider the statute as of the time its jurisdiction is invoked, rather than some hypothetical future date. 380 U. S. ——, 14 L. Ed. 2d 22, 31.

During the time this jurisdictional statement was being prepared by counsel for appellants, it came to their attention that on May 10, 1965, the following indictment was handed down solely against appellant Wells by the Dougherty County grand jury, charging him under §26-904:

> The grand jurors, selected, chosen and sworn for the County of Dougherty, to wit: [names of grand jurors omitted] In the name and on behalf of the citizens of Georgia, charge and accuse S. B. Wells with the offense of circulating insurrection papers for that the said accused, in the county aforesaid, on the 15th day of August, in the year of our Lord, Nineteen Hundred Sixty-Four, with force and arms, and unlawfully, did then and there introduce, bring, print and circulate, and did cause the same to be brought, introduced, printed and circulated, and did assist in bringing, introducing, printing and circulating, within the county and State aforesaid certain papers, pamphlets, cards, sheets, circulars, magazines, books, and writing for the purpose of inciting insurrection, riot, conspiracy, and combined resistance to and against the lawful authority of the State of Georgia and against the lives of the inhabitants thereof, with intent to incite insurrection and to abolish, defeat, and overthrow by acts of violence the lawful authority of the State of Georgia, said insurrectionary literature being as follows, to wit:
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> Attached are exhibits "A" and "B" all contrary to the laws of said State, the good order, peace and dignity thereof.
>
> Robert W. Reynolds
> Solicitor General

Exhibits "A" and "B" are copies of the leaflets introduced in this case as plaintiffs' exhibits "A" and "B" and reproduced in n. 1,

In view of the actual basis of its decision, the lower court's discussion of the statute was dicta. However, it indicates clearly the conclusion that would be reached were this case merely remanded for reconsideration in light of *Dombrowski*. This is particularly true since the lower court has already denied a request by appellants to reconsider its opinion because of *Dombrowski* and to decide the constitutional issue. Therefore, this court should reach and decide the questions raised; first, whether the entire statute is unconstitutionally vague on its face; and second, assuming that the statute without the words "inciting insurrection" would be valid, whether those words can constitutionally be severed from the rest of the statute and the remainder upheld.

A. Appellants argue that §26-904 in its entirety is unconstitutional for the same reasons §26-902 was so found in *Herndon* v. *Lowry*. There, the court said:

> The Act does not prohibit incitement to violent interference wtih any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and characterization of the defendant's utter-

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supra. The name of appellee Laurie Pritchett, as well as that of appellee Reynolds appears on the indictment.

A motion for a stay of any prosecution under the indictment, pending final disposition of this case, was filed in the court below on June 14, 1965, with a certified copy of the indictment attached. Notice has been given to the court below to make the motion part of the record in the case in this court.

The handing down of the indictment by the grand jury is not a bar to the federal courts granting relief since it was done after the filing of the complaint herein. *Dombrowski* v. *Pfister*, 380 U. S. 479, 14 L. Ed. 2d 22, 27, n. 2. To date, there is no indictment against appellant Harris.

> ances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense.
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> * * * * *
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> The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment. 301 U. S. 261-264.

This criticism, which clearly applies to the words "inciting insurrection" in §26-904, applies with equal force to the rest of the statute. The statute cannot reasonably be construed to reach riot or conspiracy *per se*, as contended by the lower court. Rather, what was intended was to punish "riot, conspiracy or resistance *against the lawful authority of the state*," with the final clause modifying "riot" and "conspiracy" as well as "resistance."

Therefore, the basic element involved in all crimes punishable under the section, as well as in all crimes punishable under chapter 26-9 as a whole, is the incitement of violent resistance against the lawful authority of the state. And, as the court held in *Herndon*, the statute is therefore impermissibly vague since it is not directed toward any specific state function or activity. It leaves it to the speculation of persons engaged in free expression, and of prose-

cutors and juries, what kind of speech is intended to be reached.

It is the uncertainty as to scope and the resulting inhibitory effect on free speech that renders the statute unconstitutional. As this Court has stated, citing *Herndon* v. *Lowry*:

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents clearly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment . . . A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press. *Winters* v. *New York,* 333 U. S. 507, 509-10.

Section 26-904 falls clearly under this rule, since in this case appellants are threatened with prosecution under it, although they have been guilty of nothing more than distributing leaflets calling a meeting to protest what they believed to be police brutality, and subsequently peacefully presenting a petition calling for corrective action to the public authorities.

In addition, because the statute encompasses constitutionally protected speech, it can be challenged by appellants even if it were assumed their acts might have been validly proscribed by a statute more narrowly drawn. *Dombrowski*

v. *Pfister,* 380 U. S. 479, 14 L. Ed. 2d 22, 28; *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98.

B. Appellants further contend that §26-904 cannot be construed so as to sever its unconstitutional and constitutional provisions. It should be noted that the District Court advanced the argument that the unconstitutional part of §26-904 might be severed from constitutional ones on the assumption that an indictment might be drawn up for distributing writings for the purpose of inciting riot. As noted in n. 6, *supra,* the state subsequently indicted appellant Wells for distributing papers for the purpose of inciting an insurrection. This demonstrates that Georgia does not consider the statute to be severable, but rather to be a unitary statute directed, as are the other sections of Chapter 26-9, against "insurrection." Thus, §26-904 should be held unconstitutional as a whole for the reasons advanced above.

However, assuming as did the court below, that an indictment for inciting to riot might still be handed down against appellant Harris, appellants maintain that the unconstitutional incitement to insurrection language cannot be severed from the remainder, and the entire section must fall. To allow severability would result in a construction which would itself render the section unconstitutionally vague and incapable of giving sufficient warning of the conduct proscribed. Cf. *United States* v. *Raines,* 362 U. S. 17, 22-23.

It is established law that there is a presumption against the severability of a statute, and that the legislature intended that a statute operate in its entirety, unless it has indicated otherwise by a severability clause. Such a clause is not present in §26-904. *Williams* v. *Standard Oil Co.,* 278

U. S. 235, 241-242. The presumption obtains even where, by severing one provision of a criminal statute, the rest of it might be upheld, since penal provisions must be construed strictly.[7] See *Butts* v. *Merchants & M. Transp. Co.*, 230 U. S. 126. Cf. *Williams* v. *Standard Oil Co., supra.*

As shown *supra,* §26-904 is part of a chapter whose purpose is to deal specifically with insurrection and attempts to incite insurrection. Therefore, the section itself, on its face and from its context, demonstrates a clear legislative intent to deal in all its parts with First Amendment activities which it was believed would promote insurrectionary acts. Similarly, it is clear that the statute was not intended to reach riot or conspiracy *per se.* Rather, it seeks to punish the incitement of riots "against the lawful authority of the state," i.e., those that are part of an insurrection.[8]

The conclusion that 26-904 is in its entirety inextricably bound up with the offense of insurrection is supported by

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[7] The presumption of nonseverability is particularly strong in the case of a statute which infringes in part on the rights of free expression. It has been held by this court that where part of a statute violates First Amendment rights and its sections are so interrelated as to be substantially one, they should be judged on their face as a unit. See *Jones* v. *Opelika,* 316 U. S. 584, 611, 615, n. 5 (dissenting opinion), *adopted per curiam on rehearing,* 319 U. S. 103; Note, 61 Harvard Law Review 1208 n. 3.

[8] An entirely separate section of the Georgia Code reaches riot *per se.* Georgia Code Annotated §26-5320 states: "Riot—Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner, shall be guilty of a riot and punished as for a misdemeanor." Prosecutions have been brought for incitement to riot under this section whereas none have been brought under 26-904. See *Loomis* v. *State,* 78 Ga. App. 336, 346, 51 S. E. 2d 33, 43 (1948); *Statham* v. *State,* 84 Ga. 17, 10 S. E. 493 (1889).

the construction of the statute (then section 58 of the Georgia Penal Code) by the Supreme Court of Georgia in the cases of *Dalton* v. *State,* 176 Ga. 645, 169 S. E. 198 (1933), and *Carr* v. *State,* 176 Ga. 55, 166 S. E. 827 (1932). In the latter case the court adopted as part of its opinion the opinion in *Gitlow* v. *New York,* 268 U. S. 652, and quoted in part:

> "And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. . . . By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." *Carr* v. *State,* 166 S. E. 827, 829.

Thus, the Supreme Court of Georgia has held that §26-904 as a whole is part of the same statutory scheme of regulation as that struck down in *Herndon* v. *Lowry,* and it must fall along with §26-902.[9]

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[9] The Georgia Court's interpretation precludes any construction by a federal court that severs the provision of the section, since it is a settled rule of law that a federal court cannot disregard the interpretation of a state statute by a state court, even if it might thereby save the statute. Therefore, cases such as *Chaplinsky* v. *State of New Hampshire,* 315 U. S. 568, are not in point. There the state court had said that the provisions of the state statute were severable.

3. The final question presented by this appeal is whether the District Court erred in not holding that §26-904 was applied for the purpose of discouraging constitutionally protected rights. Appellants alleged in their complaint:

> Defendants are well aware that §26-902 has been determined unconstitutional, by the United States Supreme Court and this Court [see *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Harris, et al.* v. *Pace, et al.*, —— F. Supp. —— (1963)] but, nevertheless have arrested and threatened the arrest of the plaintiffs Harris and Wells. This threatened attempt to enforce and execute this statute, as well as §26-904 against plaintiffs, is . . . part of an overt scheme and plan by defendants, and others, acting in concert, and in violation of 42 U. S. C. §§1971, 1981 and 1983 to oppress, threaten and intimidate citizens of the United States, including plaintiffs, who are engaged in the exercise of rights, privileges and immunities guaranteed by the Constitution and laws of the United States (R. 26).

The lower court decided, after considering the constitutionality of the application of §§26-902 and 26-904, "[I]t is apparent that this court's injunction to restrain these defendants, or any of them, from the further use of §26-902 is neither necessary nor needed." 238 F. Supp. at p. 785. Further, that "[e]ven if it should ultimately be determined that Georgia Code §26-904 as applied to these plaintiffs is unconstitutional, the plaintiffs are not without adequate remedy and protection short of the issuance of this Court's injunction." [*Id.*] Appellants were thus required to submit their federal constitutional claims to state court determination.

The lower court's opinion, in refusing to enjoin further enforcement of §26-904, as unconstitutionally applied, squarely rejects this court's decision in *Dombrowski* v. *Pfister, supra.* There, it was decided that where state statutes were unconstitutionally applied for the purpose of discouraging protected conduct, federal injunctive relief against further state prosecution was appropriate. A contrary view, as this court pointed out in *Dombrowski,* would subject appellants to continued bad faith prosecution, even after substantial federal rights had been invaded.

Appellants' contentions, that both §§26-902 and 26-904 were being applied in bad faith, and to discourage engagement in protected activity, were wholly supported by the record below.

First, the record clearly shows that the handbill distribution by appellants Wells and Hand was not to urge "rioting" or "insurrection," as charged in the warrant,[10] but, as even the lower court states, merely to urge a meeting at Eureka Baptist Church (283 F. Supp. p. 782). No handbills were distributed during the meeting (R. 323), nor even referred to (R. 323), and only the petition, later presented to Assistant Chief Summerford, was read by Wells during his speech (R. 350). Wells at no time advocated destruc-

[10] The state arrest warrant charged Wells with both offenses (26-902 and 26-904) in essentially the same language:

> 26-902 Ga. Code. Attempt to incite insurrection; and 26-904 Ga. Code, Circulating insurrectionary papers.
>
> Subject did circulate papers attempting to incite insurrection Ga. Code 26-902 also attempting to incite insurrection at a meeting at Eureka Baptist Church on South Jackson Street 8/15/64. Subject did incite enough to the extent rioting in Harlem, breaking windows out of several store fronts and causing considerable damage by Rock and Bottle Throwing (Pls. Ex. E).

tion of property, and his uncontradicted testimony was that he advocated only the petition's presentation as an appropriate form of protest:

> I would rather for them to go down and peacefully protest than to do anything otherwise. That's what causes other things, is because you don't have any way to let out your expressions; . . . (R. 329).

Nor, during the procession from the church to the police station, did Wells or Harris advocate or commit any violence (see findings 283 F. Supp. at p. 782). And, although the lower court found that violence was committed by those marching with appellants, or sympathizers, there was no evidence in the record to support that conclusion. (See Statement, *supra*, pp. 7-9.)

Second, with full knowledge of these facts, gathered from "reports" received from officers (R. 220), Chief Pritchett caused the arrest of appellants Wells and Harris, and Nick Louketas under §§26-902 and 26-904, and although there were numerous arrests on charges of looting, burglary and "for investigation," there were no other arrests under either of these statutes. In fact, only these three, who made the actual presentation of the petition at the police station, were charged under §§26-902 and 26-904 (Wells and Harris had signed the petition at the insistence of the assistant chief of police).

Wells and Louketas served 13 and 5 days respectively, awaiting state prosecution under 26-902 which was known by the Chief of Police to be invalid.[11] And, although the

[11] In the commitment hearing of appellant Wells, conducted before defendant G. S. Thornton, Chief Pritchett was asked by

lower court found that evidence that the arrests were made with "some information" of the invalidity of one of the statutes (26-902) it concluded that this did not establish that appellant's constitutional rights had been deprived with "deliberate intent." But, the initial prosecution under both statutes, combined with Wells' continued incarceration after Chief Pritchett had been placed on notice of the statute's invalidity, were obviously designed to discourage further presentations of the kind Wells had made.

Thus, on the record, remission of appellants to state trial would subject them to the same continued harassment prosecution which this court condemned in *Dombrowski* v. *Pfister, supra;* and, *Cameron* v. *Johnson,* —— U. S. ——, 33 U. S. L. Week 3395.

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one of plaintiffs' counsel whether he wasn't aware that the statute (26-902), under which the warrant issued, had been declared unconstitutional:

> Q. Now the fact that you have read that the holding of the Federal Tribunal has declared that this law is unconstitutional, would that make any difference with reference with reference [sic] to your deciding to withdraw the warrant? A. With Judge Tuttle—did he sign it—Judge Tuttle ruling it was unconstitutional. I suppose he did, I didn't see him sign it,—it wouldn't make any difference to me.
>
> Q. Even if this was true, it would make no difference to you? A. As I say, attorney, I don't know whether it is unconstitutional or not when the Courts rule on it.
>
> Q. But you didn't answer my question, Chief, would it make any difference to you? A. It wouldn't make any difference to me (Pls. Ex. D, p. 8).

CONCLUSION

It is respectfully prayed that the Court should review the judgment of the District Court and enter a judgment reversing the decision below.

Respectfully submitted,

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APPENDIX

Opinion of the Court Below

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT GEORGIA, ALBANY DIVISION

Feb. 24, 1965

Civ. A. No. 821

SAMUEL B. WELLS, DONALD HARRIS *et al.*,

Plaintiffs,

—v.—

FRED HAND, JR., individually and as Solicitor General, Albany Judicial Circuit, *et al.*,

Defendants.

Before:

BELL, *Circuit Judge,*
and BOOTLE and ELLIOTT, *District Judges.*

ELLIOTT, *District Judge*:

In attempting to make an arrest of a Negro man on August 15, 1964 a member of the City Police force of the City of Albany, Georgia fired a shot which resulted in the death of the man sought to be arrested. Neither the Plaintiff Wells nor the Plaintiff Harris witnessed this incident; but, based on "reports" which they heard concerning the matter, they concluded that the officer was guilty of

"murder" and they decided that they would do something about it. During that afternoon they prepared two handbills and distributed them widely in the Negro community in the City of Albany. The first handbill was as follows:

"ALBANY POLICE HAVE MURDERED
ANOTHER NEGRO!

THIS AFTERNOON ANOTHER ONE OF PRITCHETT'S GUNMEN SLAUGHTERED A NEGRO MAN, WILBERT JONES, OF FRONT STREET.

THIS BLACK MAN, LIKE THE LONG LIST OF OTHERS KILLED BY PRITCHETT'S MURDEROUS MOB . . . INCLUDING ONE GUNNED DOWN TWO WEEKS AGO IN C.M.E. . . . PLUS HARRIS, ASBURY, MILLER AND OTHERS, WAS UNARMED AND IN NO WAY BREAKING THE LAW WHEN HE WAS SHOTGUNNED IN THE BACK.

TONIGHT IS THE TIME TO ACT

BLACK MAN * * AREN'T YOU TIRED OF GOING TO FUNERALS?
AREN'T YOU READY TO ACT?

BE AT EUREKA BAPTIST CHURCH * * IN HARLEM * * ON JACKSON STREET AT 8:00 TONIGHT

BE AT EUREKA BAPTIST CHURCH TONIGHT IN HARLEM

JACKSON ST. NEXT TO GILES 8:00 p.m."

(The Pritchett referred to is the Chief of Police of Albany.)

The other handbill was in this fashion:

"ALBANY POLICE HAVE MURDERED
ANOTHER NEGRO!

ALBANY POLICE HAVE KILLED TOO MANY NEGROES . . .

. . . REMEMBER HARRIS?
. . . REMEMBER ASBURY?
. . . REMEMBER MILLER?

2 WEEKS AGO A NEGRO WAS SHOT IN THE BACK IN CME . . .

IT IS TIME TO ACT!

BE AT EUREKA BAPTIST CHURCH
TONIGHT IN HARLEM

JACKSON ST. NEXT TO GILES 8:00 P.M."

In response to the urging of the handbills a crowd gathered at the street corner near the Baptist Church mentioned at the appointed hour of 8:00. This was on Saturday night near the center of what is known as "Harlem" and in an area where there is normally considerable pedestrian and automobile traffic and at a time when a street corner orator would be likely to attract attention. The Plaintiff Wells rented a microphone and loud speaker and addressed the crowd assembled, which he estimated to be between 200 and 300 persons. The gist of his speech was to remind the crowd of the details of what he considered to be police atrocities against members of the Negro race and his remarks were in the same general tone as suggested by the handbills previously distributed. He urged the crowd to do

something about it and he stated that he had prepared a petition which he was going to present to the Chief of Police at the City Hall and that he was going to march from the meeting place down to the City Hall for that purpose, and he invited the crowd to go with him. He then set out on foot to march to the City Hall and a considerable number of his audience, being thus agitated and urged, proceeded to go with him. From the evidence it is difficult to determine with any degree of certainty how many there were in this throng, but it is clear that the number was sizeable. The Plaintiff Wells led the march and the Plaintiff Harris brought up the rear. Being thus shepherded the multitude set out for the City Hall, which was some blocks away. As might be expected, the march was attended by considerable commotion, and before reaching the announced destination bottles, stones and bricks were being hurled, plate glass windows in business establishments were being knocked out, citizens were being threatened and the peace and security of the entire area through which the procession was passing was being disrupted. There is no evidence that the Plaintiffs Wells and Harris committed any of these acts of violence but it is clear that the acts were being committed by those marching with them or by sympathizers accompanying the marchers. After having proceeded some distance on the way the Plaintiff Wells and the Plaintiff Harris decided for some reason to go back to the original meeting place and make the trip by automobile and this they did with a small group. After they withdrew, acts of vandalism and looting were widespread in the area into which the crowd had been led and these acts were directed toward business establishments either owned or operated by white persons. Principal victims

were a jewelry store, a liquor store, a loan company, a drug store and a bus station. Physical damages amounted to several thousand dollars. It was not until some two and a half hours later that a semblance of order was restored in that section of the community. A number of arrests were made for burglary, looting, assaults and related offenses. In the meantime Plaintiffs Wells and Harris, together with a small group, had gone to the City Hall where the Police Headquarters are located to present their written complaint to the Chief of Police, Mr. Pritchett. They learned that the Chief was out of town and they presented their complaint to the Assistant Chief, Mr. Summerford. He received the complaint and stated to the group that he would hand it to Chief Pritchett upon his return to the city. It was during the time when the Plaintiffs Wells and Harris were in conference with the Assistant Chief that the reports began coming in to headquarters concerning the damage and looting in the area from whence the Plaintiffs had recently come and the Assistant Chief inquired of Wells and Harris whether their group was responsible for that activity. The Plaintiffs disavowed any responsibility in the circumstances.

Based upon subsequent investigation the Chief of Police, Mr. Pritchett, made affidavit before G. S. Thornton, Justice of the Peace, that a warrant might issue for the arrest of the Plaintiff Wells for violation of § 26-902 of the Georgia Code, attempting to incite insurrection, and also for violation of § 26-904 of the Georgia Code, charging him with circulating insurrectionary papers.[1] By virtue of the war-

[1] "§ 26-902. *Attempt to incite insurrection.*—Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

"§ 26-904. *Circulating insurrectionary papers.*—If any person shall bring, introduce, print, or circulate, or cause to be introduced,

rants so issued the Plaintiff Wells was taken into custody and he was detained for thirteen days without bond, the offense described in § 26-902 being a non-bailable offense. Upon investigation, the Solicitor General, Mr. Hand, who would be the state prosecutor of the offenses, concluded that the Plaintiff Wells could not be prosecuted under § 26-902 and he directed that the Plaintiff Wells be released from any charge under that section, whereupon the Plaintiff Wells was released on $2,500.00 bond with respect to the charge pending against him under the provisions of § 26-904. No charge has ever been made against the Plaintiff Harris for violating § 26-902. He has been charged by warrant with violating § 26-904 and bond has been set at $2,500.00. The Plaintiff Harris has never been taken into custody under this warrant, so the Plaintiff Harris has never been jailed and the Plaintiff Wells has not been in custody since August, 1964. As heretofore indicated, all of the matters related took place in August, 1964.

On September 15, 1964 the Plaintiffs filed the complaint which is now before us under the provisions of Title 42 U. S. C. §§ 1971, 1981 and 1983, by which they sought to have a three-judge district court convened pursuant to Title 28 U. S. C. §§ 2281 and 2284. By subsequent amendment Plaintiffs also invoked the provisions of Title 28 U. S. C. § 1343(3) and (4).

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circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years."

This complaint as originally filed contained a number of allegations for which there is no support in the record and joined a number of defendants who have since been stricken as parties. Originally the Mayor and all of the members of the City Council of the City of Albany were named as parties defendant. The City of Albany itself as a body corporate was also named a party defendant. The Sheriff of Dougherty County was also named. No evidence of any nature connected these defendants with the matter under consideration and the City of Albany and the Mayor and the several members of the City Council were stricken as parties Defendant on motion of the Defendants and the Sheriff of Dougherty County was stricken as a party Defendant on motion of the Plaintiffs. One additional Defendant, Billy L. Manly, Captain of Detectives, was added by amendment to the original complaint. The Defendants remaining in the case are Fred Hand, Jr., Solicitor General of the Albany Judicial Circuit,[2] G. S. Thornton, Justice of the Peace in Dougherty County,[3] Laurie Pritchett, Chief of Police of the City of Albany and Billy L. Manly, Captain of Detectives in the Albany Police Department. As originally filed, the complaint prayed for an injunction to issue restraining the Defendants "from denying plaintiffs, or members of the class on whose behalf plaintiffs sue, the right to participate in the solicitation, promotion, and encouragement of others to register and vote". It also asks this Court's injunction to restrain the Defendants "from denying plaintiffs, and the members of their class the right

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[2] We judicially notice the fact that Mr. Hand no longer holds office as Solicitor General of the Albany Judicial Circuit.

[3] We judicially notice the fact that Judge Thornton is now deceased.

to conduct peaceful public assemblies, or meetings to protest against state-enforced segregation, or any unlawful, unwarranted or arbitrary abuses of state power".

Upon the hearing on this matter no evidence whatever was presented showing any denial on the part of these Defendants, or anyone else for that matter, of the right of the Plaintiffs to participate in political activities, including the right to register and vote, and at no time during the hearing was any evidence offered or any suggestion made that there was any issue of segregation of the races involved here. This leads us to conclude that these allegations were either made carelessly or for the purpose of window dressing, and no further consideration will be given to those contentions.

The only matter of substance in this case is the contention made by the Plaintiffs that Georgia Code §§ 26-902 and 26-904 are unconstitutional and that all of these Defendants were well aware of that fact, but nevertheless the Defendants entered into an "overt scheme and plan", "acting in concert", to deprive the Plaintiffs of their constitutional rights and privileges, using these statutes for that purpose.

Assuming the burden of proving this contention, the Plaintiffs ask that this Court enjoin the Defendants from further enforcement of these statutes and from further prosecution of the criminal actions against the Plaintiffs Wells and Harris based upon the warrants issued as heretofore described.

It appears to be conceded by all concerned that no prosecution may be had under Georgia Code § 26-902 in the light of the decision by the United States Supreme Court in Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937), but the evidence before us would not justify a

finding that the Defendants were well aware of that decision and nevertheless entered into a scheme between themselves to cause an arrest to be made for the purpose of depriving the Plaintiff Wells of his constitutional rights. The Chief of Police who swore out the warrant based on Code § 26-902 against Plaintiff Wells may have had some information concerning the invalidity of that Code Section, but he is not a person versed in the law and it would require speculation on our part to conclude that his action in using an invalid statute was with deliberate intent to deprive the person arrested of some constitutional right. The Defendant Manly simply made an investigation in his capacity as Chief of Detectives and the Justice of the Peace, Judge Thornton, issued the warrant in the same routine fashion in which warrants are usually issued by a Justice of the Peace and the Defendant Hand, the Solicitor General, is not shown to have even had any connection with the matter until several days after the warrant had been issued when it became a state court concern, and when he determined that § 26-902 had been held to be unconstitutional he directed that the charges pending against the Plaintiff Wells based upon § 26-902 be abandoned, and subsequently he caused the Grand Jury to return a no-bill in that connection. As soon as the Solicitor General advised Mr. Pritchett that proceedings could not be had under § 26-902 the Police Chief abandoned any thought of further prosecution and the Plaintiff Wells was released from custody. All of this was accomplished before this complaint was filed and none of these circumstances indicate to us the existence of a scheme or a plan among these Defendants as charged in the complaint. Further, during the course of the hearing on this matter Chief Pritchett testified that he had no inten-

tion of making any further arrests based upon § 26-902, and Solicitor General Hand has made it clear to this Court from the inception of this matter that he has no intention of prosecuting any such case. It is apparent that this Court's injunction to restrain these Defendants, or any of them, from the further use of § 26-902 is neither necessary nor needed.[4]

With regard to the charges pending against the Plaintiffs Wells and Harris based upon the alleged violation of Georgia Code § 26-904, we are asked by the Plaintiffs to enjoin further prosecution in the state court based on this Code Section on the ground that this section is also unconstitutional. The theory of the Plaintiffs is that § 26-904 is related to § 26-902 and since § 26-902 is unconstitutional it, therefore, follows that § 26-904 is likewise invalid. We do not think that this necessarily follows. It is true that both of these sections relate to the subject of "insurrection", but these Code sections were not enacted at the same time as companion measures, they do not prescribe the same penalties and § 26-904 embraces matters not dealt with by § 26-902.

Under the provisions of § 26-904 prosecution can be had for matters having to do with subjects other than insurrection and the offense is not simply the circulating of papers but the doing of those acts for the purpose of inciting insurrection, *riot, conspiracy or resistance against the lawful authority of the state, or against the lives of the inhabitants thereof.* Assuming a properly prepared indictment under this section, the prosecutor would only have to prove the

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[4] The facts recited in this memorandum opinion are to be considered as findings of fact within the meaning of Rule 52, F. R. Civ. P.

purpose of inciting *one* of those proscribed activities. It could be simply *riot*. It is true that the warrant which was issued in these cases by the Justice of the Peace refers to "insurrectionary papers" by which it is claimed the Defendants "attempted to incite insurrection", but in Georgia the true character of a criminal accusation or indictment is not fixed by the denomination of the crime given to it by the pleader, but rather by the particular allegations of the indictment, that is to say, the name which is given to the crime which is charged in the accusation or indictment does not characterize the offense but the nature of the crime is determined from the description of the crime alleged to have been committed. Owens v. State, 92 Ga. App. 61, 87 S. E. 2d 654; Brusnighan v. State, 86 Ga. App. 340, 71 S. E. 2d 698. Neither of these Plaintiffs has yet been indicted by the Grand Jury. If they are indicted that part of the indictment which would ultimately control would be the factual allegations set out in support of the alleged violation of the statute and that portion of the indictment could just as well establish a charge of inciting a riot as inciting to insurrection. This Court at this stage of this matter refrains from expressing any view concerning the constitutionality of Georgia Code § 26-904 having in mind that a presumption of constitutionality attaches to all state statutes and if any state of facts reasonably can be conceived that will sustain the statute as against an alleged violation of the federal Constitution the existence of that state of facts must be presumed. Spahos v. Mayor, etc. of Savannah Beach, 207 F. Supp. 688 (D. C. Ga., 1962), affirmed 371 U. S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269.

Even if it should ultimately be determined that Georgia Code § 26-904 as applied to these Plaintiffs is unconstitu-

tional, the Plaintiffs are not without adequate remedy and protection short of the issuance of this Court's injunction. Federal courts of equity have traditionally been loathe to restrain criminal proceedings in the state courts even on constitutional grounds when all of the constitutional issues can be decided in the first instance as a matter of course by the state courts. Douglas v. City of Jeanette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943). In the absence of an affirmative showing to the contrary this Court cannot anticipate erroneous action by the state trial and appellate courts and we should not do so for considerations of both law and policy, the policy referred to being the desirability of avoiding wherever possible conflicts between the state and federal judicial systems.

> "Ordinarily, there should be no interference with such (state) officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." Fenner v. Boykin (1926), 271 U. S. 240, 243, 46 S. Ct. 492, 493, 70 L. Ed. 927.

There has been no showing here that these Plaintiffs will not be afforded adequate protection with respect to their contentions in the state court. As already noted, the alleged invalidity of a state law is not of itself grounds for equitable relief in a federal court. The controlling question is whether the Plaintiffs have made a sufficient showing that the need for equitable relief by injunction is urgent in order to prevent great and irreparable injury. American Federation of Labor v. Watson, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946). The injunctive relief sought in this complaint against the enforcement of a state penal statute, even if that statute is contrary to the federal Constitution, must be measured by the extraordinary circumstances rule and considerations of whether the danger of irreparable loss is both great and immediate. The mere fact that the Plaintiffs may be convicted in the state court does not create such extraordinary circumstances as would justify an injunction and it has been frequently held that a federal court should not ordinarily interfere with state officers charged with the duty of prosecuting offenders against state law.

> "That equity will stay its hand in respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a rule of wide and general application under our legal system. * * It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong." Ackerman v. International Longshoremen's & Warehousemen's Union, 187 F. 2d 860, 868 (9 Cir., 1951), cert. den. 342 U. S. 859, 72 S. Ct. 85, 96 L. Ed. 646.

There are no circumstances in this case which create a great and immediate danger of irreparable loss to the Plaintiffs Wells and Harris. Neither of them is being held without bond, neither of them is in jail, neither of them is without remedy in the state court, neither of them has been deprived of any right of defense in the state court. Indeed, there is no showing that either of them will be damaged in any way beyond the normal concomitants of a criminal prosecution. The plaintiffs simply desire that this Court determine a constitutional question which, in the view of this Court, should be first considered by the state court.

We note that the Plaintiffs suggest that although the Plaintiff Wells is free from custody on a $2,500.00 bond, his bondsman might surrender him, and that although the Plaintiff Harris has never been arrested, if he were arrested he might be unable to make a bond in the amount of $2,500.00, and in the event these things happened this would result in the Plaintiffs being held in jail pending the determination of the legal issue which they raise concerning the constitutionality of the applicable statute. The possibility of this happening can be minimized by a reduction in the bonds required of Wells and Harris to a lesser figure than that now assessed by the state authorities.

Accordingly, and for the reasons indicated, all of the prayers for injunctive relief are denied, provided the Defendants or their successors in office shall accomplish a reduction in the bonds assessed in the case of the Plaintiff Wells to an amount not exceeding $1,000.00 and in the case of the Plaintiff Harris to an amount not exceeding $1,000.00.